

**PUBLIC INTEGRITY COMMISSION
MINUTES
April 17, 2018
10:00 A.M.**

1. Call to Order: 10:01 a.m. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Andrew Manus; Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for March 20, 2018: Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote—4-0, approved.

3. Administrative Items

- A. New Commissioner Introduction—Mr. Andrew Manus
- B. New Commissioner confirmation scheduled for April 18th—Kyle Evans Gay
- C. Tablets received and operational—waiting for Commissioner's log-in information
- D. Candidate Financial Disclosure filings—48 new filers
- E. Upcoming Trainings:
 - 1. April 16—State Racing Commission
 - 2. May 14—City of Dover Employees
 - 3. May 24—City of Dover Employees
 - 4. June 1—Delaware League of Local Governments
 - 5. June 5—City of Dover Employees
 - 6. June 7—City of Dover Employees
 - 7. June 20—[Agency]
 - 8. June 26—City of Dover Council
 - 9. July 19—State OMB

4. Motion to go into Executive Sessionⁱ to Hear Requests for Advisory Opinions, Waivers and Referrals. Moved—Commissioner Tobin; seconded—Commissioner Whetzel. Vote—4-0, approved.

5. 18-17—Outside Employment

Applicant was not available to attend in person but stated she would be available by cell phone. Commission Counsel reviewed the legal memo with the Commission and then attempted to call the applicant two times. Applicant did not answer and Commission Counsel left a message for her to call back. The Commission decided to return to this matter later in the meeting.

6. 18-15—Personal or Private Interest

[Employee] accepted a casual/seasonal position with [a specific Department] as a [Division] Coordinator. The [Division] was [involved in an annual event involving State employees and private entities]. Her duties included: reviewing applications from organizations who wanted to be included in the [Division's] program; coordinating activities; working with State agencies to distribute [Division] materials; coordinating media relations for the [Division]; completing reports.

[Employee] also worked as a contractor for [a Division of a separate Department]. The contract on which she was working required her to organize documents, submit grant applications and solicit funds to facilitate the State's acquisition of a [certain property]. The contract expired in June 2018.

[Employee] asked the Commission to decide if her work on her [private] contract created a conflict of interest with her position as the [Division] Coordinator.

A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

Employee's duties as the [Division] Coordinator did not appear to overlap with the duties she was performing under [her private] contract. When asked by the Commission if there would be any overlap between the [organizations] she worked with [under the private contract] and those she would work with as the [Division] Coordinator, she stated there was no overlap. Employee pointed out that while she would be the [Division] Coordinator, [she would have no decision-making authority about the financial benefits awarded to each entity]. Based on the foregoing, the Commission determined that her dual roles would not create a situation in which she would be reviewing and disposing of matters in which she had a private interest.

B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

As long as [Employee] did not have contact with the same entities while performing her [State and private job] duties, it was difficult for the Commission to see how the public could perceive her dual positions as contrary to the public trust.

[Employee] was also advised about the State's prohibition against using State time and resources to work on her private contract. 29 Del. C. § 5806(e).

[Employee's] private contract did not create a conflict with her position as the [Division] Coordinator as long as she did not use State time or resources to work on the contract. Moved—Commissioner Whetzel; seconded—Commissioner Manus. Vote—4-0, approved.

7. 18-18—Personal or Private Interest

[Employee] worked for [a Division] of a [State Agency]. [Employee] evaluated children referred to her from the [Agency's] other divisions. The vast majority of the children she evaluated were aged 5 through 18 and received health insurance through the State Medicaid program. After completion of the evaluations, [Employee made recommendations for care and worked with other professionals treating the client].

[Employee] wanted to open a private [business] to provide [services] to be used [for purposes related to education]. At the hearing, [Employee] stated that If a family were to request [her services], she would only accept private-pay clients. If [an educational facility] requested [her services] she would decline to evaluate any [child] receiving Medicaid benefits. She believed that those limitations would reduce the likelihood that she would encounter a child she had previously [encountered] as part of her State job duties.

[Employee] asked the Commission to consider whether her private [business] would create a conflict of interest with her State position.

A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

[Employee]'s private [business] qualified as a private interest. However, given the fact that [Employee]'s State clients were Medicaid recipients and her private clients would be self-pay clients, it was unlikely she would encounter her State clients while performing her private job duties and vice versa. As a result, it was unlikely she would be required to review and dispose of matters in which she had a private interest. In the unlikely event she were to encounter one of her private clients while performing her State job duties, [Employee] was aware of the need to recuse herself from that client

and had received approval from her supervisor to do so. In the event [Employee] were to encounter one of her State clients while working in her private [business], she would recuse herself from [working with] that child.

B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

It was unlikely that [Employee] would encounter clients from one position while performing job duties related to the other position. In the event such a circumstance were to occur, she would recuse herself as necessary. Therefore, her dual employment was unlikely to create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the dual employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated she would work at her private [business] outside of her State work hours.

[Employee]’s private [business] did not create a conflict of interest with her State position as long as she abided by the limitations discussed and she recused herself as necessary. Moved—Commissioner Tobin; seconded—Commissioner Whetzel. Vote—4-0, approved.

8. 18-17—Outside Employment

[Prospective employee] returned Commission Counsel’s earlier call and she was placed on speaker phone so the Commission could ask her questions about her position [with her private employer].

[Prospective employee] worked full-time for [one of the State’s vendors] as a Shift Coordinator. [The vendor] provided services to clients of state and county agencies. [Vendor] had two [facilities] in Delaware. [Prospective employee]’s job duties involved direct patient care and included: developing plans, coaching patients; documenting services provided; coordinating plans with the patient’s family and other treatment providers; managing the [Vendor’s] capacity management plan.

[Prospective employee] applied for a casual/seasonal part-time position within the Department of Health and Social Services. [Prospective employee] would be assigned to [a

specific unit] which acted as the "gatekeeper" for [specific] services. Those services included residential treatment programs. Individuals who wanted to enroll in a program had to apply for services through the [unit]. The [unit] evaluated the need for the services [based on a number of criteria]. If the [unit] determined that a person was eligible for services, they would authorize a specific quantity of services and link the eligible person to a community provider. The Vendor was one of those providers. [Prospective employee]'s job duties would not include patient care. She would be responsible for locating [placements] for individuals referred to [the unit] by community providers.

[Prospective employee] asked the Commission if her work with [the Vendor] created a conflict of interest which would prevent her from accepting the position with [the State].

(A) Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It was possible that while working for [the State, Prospective employee] would be required to refer patients to [the Vendor], her full-time employer. However, her referral would be based upon an objective, needs-based assessment tool used by [the State] to determine the appropriate long-term placement for patients based upon their circumstances and diagnoses. The assessment tool was a ratings scale to which long-term care providers were assigned a value based upon the services they provided. [The Vendor] was the only provider assigned to their segment of the scale. As a result, if the assessment indicated that the most appropriate placement for the patient was [with the Vendor], [Prospective employee] would relay that information to the community provider. The community provider would then contact [the Vendor] to begin the placement process for their patient. At [the Vendor's location], placement decisions were made by [senior staff] and [Prospective employee] did not have a role in that process. Consequently, the Commission decided that while there was some overlap between the two positions, the overlapping tasks did not require [Prospective employee] to use her independent judgment. As a result, she would not have the opportunity to make decisions based upon impaired judgment while performing her official duties.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Prospective employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). Her ability to show preferential treatment to anyone was eliminated by [the State's] use of the needs-based assessment tool. The assessment tool controlled the recommendation for placement and [the Vendor] was the only provider assigned to their segment of the scale. As a result, [Prospective employee]'s ability to show preferential treatment to anyone was obviated.

(3) official decisions outside official channels:

There did not appear to be an opportunity for [Prospective employee] to influence official decisions outside official channels. That was not to say she would do so, she was entitled to a strong presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). [Prospective employee]'s ability to make referrals to her full-time employer while working for [the State] was controlled by an independent assessment tool. Therefore, her dual roles were unlikely to create an appearance of impropriety amongst the public.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Prospective employee] stated she would work at her full-time job outside of her State work hours.

As long as the referrals [Prospective employee] made while working for [the State] were based upon an independent assessment scale, her dual positions at [the State] and [the Vendor] did not create a conflict of interest. Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote—4-0, approved.

9. Motion to go out of Executive Session: Moved—Commissioner Tobin, seconded—Commissioner Whetzel. Vote—4-0, approved.

10. Adjournment: Next meeting May 15, 2018

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.